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Nos. 87-821, 87-827 and 87-1095

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PITTSTON COAL GROUP, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Petitioners,

v.

CHARLIE BROYLES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FOURTH CIRCUITS

BRIEF OF THE NATIONAL COAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	i-vii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
1. APPLICATION OF SSA'S INTERIM PRESUMPTION TO DEPARTMENT OF LABOR CLAIMS IGNORES FUNDAMENTAL DIFFERENCES IN THE NATURE OF THE PROGRAMS AND THE ROLE OF THE COAL INDUSTRY IN THE REGULATORY AND LEGISLATIVE PROCESS	6
2. APPLICATION OF SSA'S INTERIM PRESUMPTION IN PRIVATELY FUNDED CLAIMS DEPRIVES THE MINE OPERATORS OF DUE PROCESS OF LAW	9
A. Labor's Interim Presumption Already is Exceedingly Generous to Claimants	9
B. Application of SSA's Interim Presumption Means Entitlement Without Giving Industry Its Day in Court	12
3. PRINCIPLES OF FINALITY IN ADVERSARY LITIGATION CANNOT BE DISREGARDED	15
CONCLUSION	18

TABLE OF AUTHORITIES

PAGE

Cases

Bethlehem Mines Corp. v. *Masssey*, 736 F.2d 120 (4th Cir. 1984) 11

Borgeson v. *Kaiser Steel Corp.*, 8 Black Lung Reporter (MB) 1-312 (1985) 12

Broyles v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987) (No. 87-1095) 4,*passim*

Cacozza v. *U.S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984) 11

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Gibas v. *Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1986) 11

Kertesz v. *Crescent Hills Coal Co.*, 788 F.2d 158 (3d Cir. 1986) 11

Mobile, Jackson & Kansas City R.R. Co. v. *Turnipseed*, 219 U.S. 35 (1910) 12

Mullins Coal Co., Inc. of Virginia, v. *Director, OWCP*, 108 S. Ct. 427 (1987) 1,2,12,13

Sebben v. *Brock*, 815 F.2d 475 (8th Cir. 1987) 4,*passim*

Sykes v. *Benefits Review Board*, 812 F.2d 890 (4th Cir. 1987) 11

U.S. Pipe and Foundry Co. v. *Webb*, 595 F.2d 264 (5th Cir. 1979) 17

Usery v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976) 2,10,12,13

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Statutes

26 U.S.C. § 4121 2

26 U.S.C. § 4121(a) 3

26 U.S.C. § 4121(b) 3

26 U.S.C. § 4121(e)(2) 3,9

26 U.S.C. § 9501 2

26 U.S.C. § 9501(a)(2) 2

26 U.S.C. § 9501(c) 3

PAGE

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28 U.S.C. § 1361 17

Black Lung Benefits Act, 30 U.S.C. §§ 901-945 7

30 U.S.C. § 902(f) 7

30 U.S.C. § 923(b) 13

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30 U.S.C. § 932(a) 15

30 U.S.C. § 932(c) 8

30 U.S.C. § 933 2

30 U.S.C. § 934 2

30 U.S.C. § 945(a)(2)(A) 10

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Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) 2

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§ 102(a) 2

§ 205 2,8

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§ 13203(a) 2,8

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§ 411-414 6

§ 411 6

§ 421-424 6

422(h) 6

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33 U.S.C. § 921 15

33 U.S.C. § 921 (a)-(c) 15

PAGE

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Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203 § 10503 (1987) 9

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Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 193-195 (1977) (testimony of Dr. Herbert Blumenfeld) 13

Problems relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means, 97th Cong., 1st Sess., 139 (1981) (statement of Carl E. Bagge, President, NCA) 9

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S. Rep. No. 743, 92 Cong., 2d Sess. 18-19, *reprinted in 1972 U.S. Code Cong. & Ad. News 2322-23* 6

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PAGE

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124 Cong. Rec. S1446 (Feb. 4, 1978) (debate on Conference Report on the 1977 Amendments) (statement of Sen. Javits) 8

128 Cong. Rec. E1979 (daily ed. May 4, 1982) (extension of remarks by Rep. Erlenborn containing statement by Ad Hoc Working Group of the American Thoracic Society) 15

131 Cong. Rec. S15, 477-79 (daily ed. Nov. 14, 1985) (remarks of Sen. Heinz and Warner) 8

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20 C.F.R. § 410.490(a) (1987) 12

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PAGE

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PAGE

Petition for a Writ of Certiorari, Pittston Coal Group. v. Sebben, *Petition for cert. granted*, 56 U.S.L.W. 3568 (U.S. Feb. 23, 1988) (No. 87-821) (Petition of Pittston Coal Group *et al.*) 4

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BRIEF OF THE NATIONAL COAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Unless reversed, the decisions before this Court in the instant proceeding may force the coal industry to accept *all* liability for thousands of black lung claims reopened by the 1977 amendments to the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, and may remove the defensive rights secured by the Black Lung Benefits Act and this Court in *Mullins Coal Co., Inc. of Virginia* v.

1. Pursuant to Rule 36.2, written consents from counsel of record for all parties to these consolidated proceedings are being filed with the Clerk of this Court with this Brief.

Director, OWCP, 108 S.Ct. 427 (1987) ("Mullins") (interpreting the U.S. Department of Labor ("DOL") rules in 20 C.F.R. Part 727, which implement the 1977 amendments) and *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976) (upholding the constitutionality of the 1969 and 1972 versions of the Black Lung Benefits Act presumptions and evidence rules against challenges by the coal industry).

The National Coal Association ("NCA") is a trade association representing coal mine operators who produce over sixty-five percent of the nation's coal. NCA's membership includes operating coal mining companies of all sizes, as well as coal brokers, equipment suppliers, coal transporters, consultants, electric utilities and resource developers.

NCA producer members, and all other U.S. coal producers, are responsible for the payment of benefits to eligible claimants under Part C of the Black Lung Benefits Act, 30 U.S.C. §§ 931-945 (the "Act"), in two direct ways: (1) as individual coal mine operator defendants[2], 30 U.S.C. §§ 932-933; and (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust fund ("BLDTF"), 26 U.S.C. § 4121. Revenues collected for the BLDTF are used to pay compensation awards to eligible claimants whose coal mine employment ended before January 1, 1970; or in cases in which an individual responsible coal mine operator cannot be identified. 30 U.S.C. § 934, 26 U.S.C. § 9501(d)(5). The BLDTF also pays all administrative expenses of the Departments of Labor, Treasury, and Health and Human Services, which operate the black lung program. 26 U.S.C. §§ 9501(a)(2), 9501(d)(5). If the BLDTF is unable to meet its obligations with the funds generated by the producers' tax on coal, it borrows money from the U.S. Treasury, which the

2. Coal operators must secure federal black lung compensation liability by purchasing workers' compensation insurance or by qualifying as a self-insurer. 30 U.S.C. § 933. Both the self-insurance and purchased insurance arrangements involve intricate financial planning by the coal operator. This planning is based on the number of claims as a percentage of payroll and the expected approval rate.

BLDTF must repay with interest. 26 U.S.C. §§ 9501(c), (d)(4).

The tax paid by coal producers into the BLDTF, augmented by two tax increases,[3] is currently set at $1.10 per ton on underground-mined coal and $.55 per ton on surface-extracted coal. 26 U.S.C. §§ 4121(a), (b). The BLDTF has collected over $3.975 billion in tonnage taxes from coal producers since 1978.[4] In fiscal year 1987, the nation's coal producers paid $572,295,000 into the BLDTF in tonnage taxes.[5] But the BLDTF has paid out over $5.54 billion in compensation since 1978,[6] and in fiscal year 1987, disbursed $605 million in compensation.[7] In order to meet the continuing shortfall between compensation levels and BLDTF revenues, the BLDTF has been augmented by appropriations from the general treasury each year since its inception in 1978. As a result, the BLDTF currently owes the U.S. Treasury nearly

3. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. No. 99-272, § 13203(a), (b), 100 Stat. 312 (1986) [hereinafter cited as 1986 Budget Reconciliation Act]. Congress provided that the 1981 tax increase was temporary, and that the producers' tax would revert to lower, 1978 rates by January 1, 1996, or when the BLDTF was no longer in debt to the U.S. Treasury for repayable advances or interest, whichever occurred first. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119 §102(a), 95 Stat. 1635 (1981); the 1986 Budget Reconciliation Act, Pub. L. No. 99-272, §13203(c), 100 Stat. 313. In 1987, the Administration proposed to increase the tax on producers yet a third time to raise $400 million in additional revenues. Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1988* at 2-41. Congress refused, instead extending the date for reversion of the current tax to the lower 1978 rate until January 1, 2014. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503 (1987), *amending* 26 U.S.C. § 4121(e)(2).

4. U.S. Dep't of the Treasury, *Black Lung Disability Fund, Status of Funds* (Sept. 30, 1987) [hereinafter cited as *1987 Trust Fund Status Report*].

5. *Id.*

6. Staff of Joint Comm. on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* 3 (Comm. Print 1985); and information supplied by James DeMarce, Associate Director for the Division of Coal Mine Workers Compensation, U.S. Dep't of Labor, in a telephone interview with Bruce Watzman, NCA (Dec. 7, 1987).

7. *1987 Trust Fund Status Report*, *supra* note 4. These disbursement figures do not include the cost of administering the program.

$3 *billion*.[8] In May 1988, the Secretary of labor requested an additional appropriation of $54 million to the BLDTF.[9]

The two decisions before this Court, *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987) (No. 87-1095) ("*Broyles*"), and *Sebben* v. *Brock*, 815 F.2d 475 (8th Cir. 1987) (Nos. 87-821 and 87-827) ("*Sebben*"), will have a dramatic impact on the coal industry. The coal industry's responsibility for black lung liability will be increased to intolerable levels if either or both cases are not reversed by this Court.[10] Under *Broyles*, employers will be forced to defend black lung claims under an exceedingly far-reaching entitlement presumption that precludes the defendant from challenging the medical bases for the presumption: the Social Security Administration "interim" adjudicatory rules at 20 C.F.R. § 410.490 ("SSA interim presumption"). These rules were never intended to apply to the workers' compensation portions of Part C of the Act and are virtually irrebuttable. Under *Sebben*, tens of thousands of finally denied and long-closed black lung claims will be reopened for relitigation under the SSA interim presumption.

The intolerable increase of unanticipated and unfunded liability which will result if *Broyles* and *Sebben* are not reversed will come at a time when the American coal industry can least afford it. NCA members are therefore critically interested in this Court's resolution of the important issues presented by these consolidated cases.

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8. *See supra* note 6.

9. *Hearings before the Subcomm. on Labor, Health and Human Service, Education and Related Agencies of the Senate Comm. on Appropriations*, 100th Cong. 2d Sess. 2 (Apr. 13, 1988) (statement of Ann McLaughlin, Secretary of Labor).

10. The Pittston Coal Group and its co-petitioners estimate that *Sebben* will burden the coal industry with as much as $13.6 billion in unanticipated and unfunded black lung liability. Petition for a Writ of Certiorari at 19, *Pittston Coal Group* v. *Sebben, petition for cert. granted*, 56 U.S.L.W. 3568 (U.S. Feb. 23, 1988) (No. 87-821).

SUMMARY OF ARGUMENT

The process culminating in the adoption of the Department of Labor's interim presumption reflects a compromise between affordability to industry and generosity to miners. The DOL regulations promulgated as a result of this compromise are so liberal that they approach unconstitutionality, but are saved by retaining some basic concept of defensive rights.

The Fourth Circuit's effective elimination of rebuttal by replacing Labor's interim presumption with that of the Social Security Administration ("SSA") transforms the black lung program into a general disability scheme rather than workers' compensation. This action misinterprets Congress's mandate, upsets the balance of the competing interests involved and results in liability to private parties without due process of law.

The Eighth Circuit's directive to reopen tens of thousands of finally closed and denied Department of Labor claims for readjudication under SSA's presumption is devoid of any legal authority. It defies the plain language of the Longshore Act barring relitigation of closed claims and removing jurisdiction from district courts. It violates the rule of res judicata. And it does this in the context of private claims litigation at extraordinary expense to the coal industry.

NCA joins the federal and private petitioners in the consolidated cases in seeking reversal of both *Broyles* and *Sebben*.

ARGUMENT

I.

APPLICATION OF SSA'S INTERIM PRESUMPTION TO DEPARTMENT OF LABOR CLAIMS IGNORES FUNDAMENTAL DIFFERENCES IN THE NATURE OF THE PROGRAMS AND THE ROLE OF THE COAL INDUSTRY IN THE REGULATORY AND LEGISLATIVE PROCESS

Title IV of the Federal Coal Mine Health & Safety Act of 1969[11] is divided into two parts, Part B and Part C. Part B deals with claims filed on or before December 31, 1972, and is funded by general federal revenues. SSA was given responsibility to administer Part B claims.[12] Part C deals with claims filed after that time. Awards under Part C are the responsibility of mine operators. DOL was chosen to administer Part C claims.[13]

The Secretary of Labor was not authorized to write regulations defining total disability under the Federal Black Lung Act until Congress amended the Act in 1977. Under the original Act, only the Secretary of Health, Education and Welfare ("HEW")was authorized to promulgate regulations for determining whether benefits should be paid under the program. Congress originally directed that SSA's regulations were to be applied in Part C claims.[14]

SSA's administration of the program from 1969-1971 was criticized by certain members of Congress who felt that too few claims were b g approved. S. Rep. No. 743, 92d Cong., 2d Sess. 18-19, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2322-23. Out of the debates and discussions that culminated in

11. Federal Coal Mine Health and Safety Act of 1969, Pub.L. No. 91-173, § 411, 83 Stat. 792 (1969), *reprinted in* 1969 U.S. Code Cong. & Ad. News 823, 880-886 [hereinafter cited as the 1969 Act].

12. The 1969 Act, Pub. L. No. 91-173 §§ 411-414, 83 Stat. 792(1969). The 1972 amendments to the Act extended Part B to include claims filed on or before June 30, 1973. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 5, § 7, 86 Stat. 155-157 (1972) *reprinted in* 1972 U.S. Code Cong. & Ad. News 183, 189, 190, 192 (amending the 1969 Act, Pub. L. No. 91-173, § 414 and adding a new § 415).

13. The 1969 Act, Pub. L. No. 91-173 §§ 421-424, 83 Stat. 792 (1969).

14. The 1969 Act, Pub. L. No. 91-173 § 422(h), 83 Stat. 792 (1969).

1972 amendments to the Act, it became clear to SSA that it was to adopt a new, interim rule to "permit prompt and vigorous processing of the large backlog of claims. . . ." *Id.* SSA promulgated its interim presumption at 20 C.F.R. § 410.490(b) (1987) in response to the 1972 amendments. 20 C.F.R. § 410.490(a) (1987). This presumption applied only to Part B claims. 20 C.F.R. § 410.490(b) (1987).

Because Part C was intended to provide workers' compensation benefits for total disability due to coal workers' pneumoconiosis, and Part B was modeled after the SSA disability program, SSA resisted extension of its interim presumption to Part C claims.[15] SSA's interim presumption was also criticized for its lack of medical foundation.[16] The debate over the extension of SSA's interim presumption to Part C claims continued for four years and was resolved in the 1977 amendments to the Act.[17]

In those 1977 amendments, Congress directed the Secretary of Labor to write his own regulations (in two sets) to be applied to reopened and newly filed Part C claims. These amendments specified, however, that in the rules for previously denied and pending claims subject to re-review by the 1977 legislation, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973. 30 U.S.C. §§ 902(f)(2), 945. DOL responded with its interim presumption at 20 C.F.R. § 727.203 (1987). Labor's regulation incorporated the medical criteria of the SSA interim presumption but also mandated consideration of all relevant evidence, and preserved the employer's right to meaningful defenses against claims

15. *See* H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 251-255.

16. *Id.*

17. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) [herein after cited as the 1977 amendments]

by requiring the consideration of scientific and medical evidence.[18] The 1977 amendments also provided for review of previously denied and pending claims under the newly established eligibility criteria.

These decisions did not take place without industry participation or comment. To the contrary, Congress repeatedly considered the effect of its actions on the coal industry and acted to make the program affordable. For example, in the 1977 amendments, Congress excused mine owners from all direct liability arising out of a miner's employment before January 1, 1970. 30 U.S.C. § 932(c). This liability was assigned to the BLDTF. Congress in 1981 transferred additional direct liability from the mining industry to the BLDTF, recognizing the unfairness of imposing additional liability on private defendants for already closed claims. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 205, 95 Stat. 1645 (1981). In 1985, when the Administration proposed to raise the tax paid by coal producers into the BLDTF by fifty percent, Congress refused. It acknowledged that the coal industry was in financial difficulty and should not be saddled with added black lung taxes.[19] Instead, Congress

18. *See* 124 Cong. Rec. S1446 (Feb. 4, 1978) (Debate on Conference Report on the 1977 amendments). Statement of Sen. Javits, conferee and sponsor:

> I wish to assure my colleagues that although the bill incorporates a number of liberalized standards governing the adjudication of black lung benefit claims, it clearly preserves its basic integrity as a workers' compensation program by requiring a finding *not only* of the *presence of black lung disease*, but, also that the claimant's *disability due to the disease* prevents him from performing coal mine work.
>
> * * *
>
> I . . . requested that the statement of managers include language to the effect that "*all relevant medical evidence*" be considered in applying the "interim" standards to the reviewed claims . . . .

[Emphasis added.]

19. 131 Cong. Rec. S15,477-79 (daily ed. Nov. 14, 1985) (remarks of Sen. Heinz and Warner). "A significant increase in the black lung excise tax would contribute to the loss of both domestic and international markets for [the] coal industry." 131 Cong. Rec. S15,478 (daily ed. Nov. 14, 1985) (remarks of Sen. Warner). A national accounting and management firm reported in 1985 that the coal industry had slowed to a very modest annual rate of growth and was subject to increased competitive pressure from other fuels. Price Waterhouse, *The Economic Impact of the President's Tax Reform Proposals on the Coal Industry, Final Report* 3 (Sept. 1985).

enacted a ten percent tax increase and placed a five-year moratorium on interest accrual.[20] Similarly, in 1987, Congress again refused an Administration proposal to increase the tax on producers yet again, and instead, extended the date by which the producers' tax would revert to its lower, 1978 rate.[21]

Congress's actions since the inception of the black lung program in 1969 have consistently recognized the competing policies of compensation to eligible miners, affordability to the industry, and procedural fairness to defendants as well as claimants. Coal industry representatives participated in this legislative debate and subsequent rulemaking.[22] As in all complex issues, a compromise had to be forged. In this case, the liberality of the DOL presumption was balanced by its procedural safeguards and Congress's promise that costs would be affordable. The decisions in *Broyles* and *Sebben* destroy this compromise and are far out of step with Congress's consistent and repeated efforts to protect the coal industry from unanticipated and uncontrolled liability.

II.
APPLICATION OF SSA'S INTERIM PRESUMPTION IN PRIVATELY FUNDED CLAIMS DEPRIVES THE MINE OPERATORS OF DUE PROCESS OF LAW

A. Labor's Interim Presumption Already is Exceedingly Generous to Claimants

Labor's interim presumption achieved the liberality to miners that Congress sought. Armed with its new presumption, Labor

20. Consolidated Omnibus Budget Reconcilation Act of 1985, Pub. L. No. 99-272, § 13203(a), (b), 100 Stat. 312 (1986).

21. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503 (1987), amending 26 U.S.C. § 4121(e)(2). None of the requests for additional funding take into consideration the potential impact of these cases.

22. *Problems relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 139 (1981) (statement of Carl E. Bagge, President, NCA).

approved 96,000 claims,[23] well in excess of congressional projections.[24] This presumption is extremely liberal. The BLDTF has paid benefits in claims eighty-four percent of which contained no evidence of disease or related disability. Comptroller General, *Report to the Congress: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* 9 (1982). Coal operator defendants been able to successfully avoid such a high percentage of unjustified awards by exercising their right to defend claims.[25] This defense is permitted primarily by DOL's rebuttal provisions which legitimately focus the entitlement inquiry on the basic elements of a compensable claim. Indeed, without the opportunity for rebuttal, Labor's presumption would be unconstitutional. *See Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976). Recent opinions by several circuit courts, however, already have substantially eroded rebuttal under Labor's rule.

The Third, Fourth, and Sixth Circuits have held that rebuttal under section 727.203(b)(2) can no longer be established by

23. Office of Workers' Compensation Programs, U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987). From 1978 to the present, approximately 96,000 BLDTF claims have been approved by the Department of Labor pursuant to the 20 C.F.R. § 727.203. The BLDTF is also responsible for compensation in approximately 24,000 previously denied claims approved by the Social Security Administration under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 and referred to the Secretary of Labor for payment from the BLDTF, 30 U.S.C. § 945(a)(2)(A); thus, the total number of claims that are the liability of the BLDTF alone because of the 1977 amendments totals approximately 120,000. *1987 Black Lung Claims Status Report, supra.*

24. H.R. Rep. No. 151, 95th Cong., 1st Sess. 26, *reprinted in* 1978 U.S. Code Cong. & Ad. News 262. Prior to the 1977 amendments and the promulgation of 20 C.F.R. § 727.203(a), fewer than 5,000 claims had been approved under Part C. See Lopatto, *the Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 691 (1983), citing Staff of Subcomm. on Oversight, House Comm. on Ways and Means, *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund*, 97th Cong. 1st Sess. 23 (Comm. Print 1981).

25. Claims involving BLDTF liability are defended by the Office of Solicitor, Department of Labor only occasionally. As a political and financial matter, they cannot and have not developed these claims to even permit rebuttal where it is possible.

proving the absence of a pulmonary disability.[26] Rebuttal under (b)(2) is no longer available if a miner is disabled for any reason—by a stroke, heart disease, osteoarthritis, or even age. By shifting the focus of (b)(2) rebuttal from pulmonary disability to disability of any origin, these three circuit courts have effectively eliminated subsection (b)(2) as a viable rebuttal method in many cases since most older claimants are disabled to some degree by non-occupational, ordinary diseases of life.

Rebuttal under section 727.203(b)(1)[27] is rarely used because most claimants are no longer working. Rebuttal under subsection (b)(4) is provided if the claimant does not have pneumoconiosis. However, (b)(4) rebuttal is difficult because most claimants can make a case that they have some form of pulmonary or respiratory impairment irrespective of whether that impairment is clinical pneumoconiosis. The definition of pneumoconiosis, 20 C.F.R. § 727.202 (1987), is broader than the "clinical" definition of pneumoconiosis.[28]

Thus rebuttal under section 727.203(b)(3)[29] is the only rebuttal avenue available in most cases. But even the scope of (b)(3) rebuttal is unclear because the circuit courts and the Benefits Review Board have adopted different proof standards.[30]

26. *Kertesz* v. *Crescent Hills Coal Co.*, 788 F.2d 158 (3d Cir. 1986); *Sykes* v. *Benefits Review Board*, 812 F.2d 890 (4th Cir. 1987); and *York* v. *Director*, 819 F.2d 134 (6th Cir. 1987).

27. Section 727.203(b)(1) provides for rebuttal if the claimant is doing his usual coal mine work or comparable and gainful work.

28. "Clinical" pneumoconiosis is actual coal dust deposition throughout the lungs which results in coal macules around the respiratory bronchioles. "Statutory" pneumoconiosis includes clinical pneumoconiosis but it also ecompasses *any* pulmonary or respiratory impairment significantly related to or substantially aggravated by coal mine employment (*e.g.*, industrial bronchitis). 20 C.F.R. § 727.202 (1987).

29. Rebuttal under section 727.203(b)(3) may be accomplished by proof that a miner's disabiity did not arise in whole or in part out of his coal mine employment.

30. The Third, Fourth and Sixth Circuits all have held that an employer must "rule out" any relationship between a miner's total disability and his occupational exposure to coal dust in order to establish (b)(3) rebuttal. *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120 (4th Cir. 1984); *Carozza* v. *U.S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984); *Gibas* v. *Saginaw Mining Co.*, 748

B. Application of SSA's Interim Presumption Means Entitlement Without Giving Industry Its Day in Court

The Fourth Circuit's holding in *Broyles* deals the fatal blow to rebuttal in Part C claims reopened by the 1978 Amendments and obliterates any semblance of due process protection to coal operators. A plainer case of the denial of employer's due process rights through the use of section 410.490 is difficult to imagine. This Court has established a constitutional threshold for statutory presumptions. *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976); *Mobile, Jackson & Kansas City R.R. Co.* v. *Turnipseed*, 219 U.S. 35, (1910). The Court has required a "rational connection" between the fact proved and the ultimate fact presumed, *Turnipseed*, 219 U.S. at 43, and has honored a long-standing prohibition against placing defendants in a situation where they cannot rebut a presumption of entitlement to benefits. *Turner-Elkhorn*, 428 U.S. at 35-36. Labor's interim presumption, as interpreted by this Court, protects this basic principle. *Mullins Coal Co.*, 108 S. Ct. 427. SSA's interim presumption does not.

The lack of a "rational connection" between section 410.490 and the medical bases of pneumoconiosis and resulting disability was conceded by SSA when it promulgated those regulations in 1972. The preamble admits that the rule was issued on an interim basis to remove a backlog of claims without waiting for establishment of more facilities to conduct extensive pulmonary testing. 20 C.F.R. § 410.490(a).

When the suggestion of applying section 410.490 to reopened Part C claims appeared during the legislative process culminating

F.2d 1112 (6th Cir. 1984), *cert. denied.*, 471 U.S. 1116 (1985). If a miner is totally disabled from a respiratory standpoint, it is difficult to prove that his occupational exposure has not made *any* contribution, however slight, to his respiratory condition. The Benefits Review Board has modified this standard and held that (b)(3) rebuttal may be established by demonstrating that there is no "significant relationship" between a miner's total disability and his occupational exposure to coal dust. *Borgeson* v. *Kaiser Steel Corp.*, 8 Black Lung Reporter (MB) 1-312 (1985). The "significant relationship" test is a traditional workers' compensation principle, which is consistent with the legislative history of the Act.

in the 1977 amendments, witnesses testified before Congress that the section 410.490 presumption was medically invalid and should not be used to establish liability of operator defendants in reopened or future Part C claims.[31] Two supervisory SSA physicians also testified before Congress in 1977 that the section 410.490 standards were "not based on substantial medical evidence" and, speaking of the ventilatory test values, found invocation values were "entirely normal and would be read by at least 95% of all physicians who were knowledgeable of the values presented as normal values."[32] Numerous studies and reports since 1977 have confirmed the fact that section 410.490 lacks the required rational connection between its presumed facts and the facts proved.[33]

The SSA interim presumption also abrogates the procedural and evidentiary safeguards accorded the employer by the "all relevant evidence" provision in 30 U.S.C. § 923(b) and acknowledged by this Court in *Turner-Elkhorn* and *Mullins*. SSA wrote section 410.490 for use in a non-adversarial setting without the coal industry's participation. If an SSA claim were denied and the claimant requested further proceedings, he appeared before

31. *Black Lung Benefits Provisions of the Federal Coal Mine Health & Safety Act: Hearings Before the House Committee on Education and Labor*, 95th Cong., 1st Sess. 241-242 (1977) [hereinafter cited as 1977 House Hearings] (testimony of Asst. Secretary of Labor Donald Elisberg).

32. 1977 House Hearings at 274-275 (testimony of Dr. Harold I. Passes). *See also Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 193-195 (1977) (testimony of Dr. Herbert Blumenfeld)*.

33. The SSA interim presumption uniformly has been criticized as medically invalid. See Comptroller General of the United States, *Report to the Congress of the United States, Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability*, HRD 80-81 (July 28, 1980) (reporting that "in 88.5% of the cases [decided by SSA] medical evidence was not adequate to establish disability or death from black lung." *Id.* at *ii*).A.D. Renzetti, Jr., M.D., *et al., Current Medical Methods in Diagnosing Coal Workers' Pneumoconiosis, and a Review of the Medical and Legal Definitions of Related Impairment and Disability*, prepared for U.S. Dep't of Labor under the auspices of the Franklin Research Center, a Division of the Franklin Institute (1983) (confirming the scientific invalidity of eligibility criteria employed in the black lung program)

an Administrative Law Judge ("ALJ"). SSA was not typically represented by counsel. The ALJ was supposed to make the claimant prove his case, but the proceeding and resulting record often lacked evidence developed by expert defense witnesses or adversary cross-examination of the claimant because there was no true defendant in the SSA cases. This procedural scheme resulted in awards in over 80% of the claims brought under SSA's interim presumption.[34] To now make employers litigate thousands of black lung claims under section 410.490 is neither justified nor equitable nor consistent with Congress's intent.

Rebuttal under SSA's interim presumption does not save the provision from its constitutional infirmities. Once a claimant invokes the presumption (20 C.F.R. § 410.490(b)(1)(i) (1987)), the inquiry switches to rebuttal. Medical evidence has no discernible role in section 410.490 rebuttal. Rebuttal is limited to evidence that the claimant is doing or able to do his usual coal mine or comparable work. 20 C.F.R. § 410.490(c) (1987). In practical terms, these rebuttal provisions are illusory because black lung claimants have typically left the workforce due to age or non-occupational infirmities. Defenses predicated upon obtaining medical proof revealing that the source of the claimant's alleged total disability is not dust exposure or pneumoconiosis—cigarette smoking being the most prevalent alternative[35]

34. SSA approved over 500,000 claims by 1978, representing over 81% of the claims filed. Letter from Secretary of HEW Joseph A. Califano, Jr., to Rep. Carl Perkins (Nov. 3, 1978); Staff of Subcomm. on Oversight, House Comm. on Ways and Means, 97th Cong. 1st Sess., *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund* 16 (Comm. Print) (1981) (citing U.S. Dep't of Labor and U.S. Dep't of Health and Human Services statistics).

35. A prominent pulmonary physician and scientist, Dr. Keith Morgan (former Director, Appalachian Laboratory for Occupational Respiratory Disease, HEW) reported to Congress in 1977 that: "The U.S. Public Health Service studies indicate that cigarette smoking is between 5 and 10 times as important as dust exposure in producing impairment of ventilatory capacity," *quoted in*, H. Rep. No. 151, 95th Cong., 1st Sess. 80, *reprinted in* 1978 U.S. Code Cong. & Ad. News 293. In May 1982, the Ad Hoc Working Group of the American Thoracic Society issued a very strong statement in favor of increased reliance on x-rays in diagnosing pneumoconiosis and calling for recognition by the DOL that cigarette smoking is usually the dominant factor for respiratory

—or proving low levels of dust exposure, do not fit into the SSA rebuttal scheme and therefore are futile. *Yet, these are the very defenses contemplated as protections against benefit awards to miners without evidence of disabling coal workers' pneumoconiosis.* *Turner-Elkhorn*, 428 U.S. at 34; *Mullins*, 108 S. Ct. at 427. Under the SSA interim presumption, invocation is tantamount to entitlement.

For these reasons, application of 20 C.F.R. § 410.490 to mine operators cannot be constitutionally sanctioned.

III.
PRINCIPLES OF FINALITY IN ADVERSARY LITIGATION CANNOT BE DISREGARDED

Firmly established jurisdictional principles are violated by *Sebben*. Reawakening tens of thousands of long closed and finally denied claims offends the strict time limitations specified in the Longshore Act. 33 U.S.C. § 921(a)-(c), incorporated into 30 U.S.C. § 932(a). Res judicata also precludes relitigation of these black lung claims. In addition, issuance of a writ of mandamus by the district court breaches the Longshore Act's limitation on district court jurisdiction. 33 U.S.C. § 921(a)-(d). These principles of finality and exhaustion are basic to our system of jurisprudence. In the context of this litigation, they must be respected to ensure some measure of predictability for an industry already plagued by unpredictable costs and expenses. *Sebben* assures that the cost to the coal industry will be uncontrollable and the result unfair.

The BLDTF is already insolvent with the industry paying 110% more in taxes than expected. Even before the Eighth and Fourth Circuits' decisions, the ability of the BLDTF to achieve solvency by 1996 was dubious.[36] With *Sebben*, the BLDTF's

abnormalities in coal miners, *reprinted in* 128 Cong. Rec. E1979 (daily ed. May 4, 1982) (extension of remarks by Rep. Erlenborn)

36. Prior to the moratorium on interest accrual enacted in 1986, DOL had predicted that advances and interest necessary to meet BLDTF obligations after the 1978 amendments could reach *$30 billion* by the year 2010. H.R. Rep. No.

financial difficulties will be stretched well beyond the coal industry's ability to respond. Reserves for claim awards, expert witness and litigation costs based on Labor's interim presumption are rendered useless by emergence of a new set of adjudicatory rules imposed by judicial fiat ten years after the enactment of the 1977 amendments. The domestic coal industry currently is under tremendous threat from pressing financial pressures resulting from rising costs and depressed prices, regulatory costs, and imported energy.[37] The huge sums that the BLDTF would be forced to pay to meet the increased liabilities stemming from *Broyles* and *Sebben* inevitably will prompt calls for another increase in the producers' tonnage tax to curb the runaway BLDTF deficit. Another black lung tax increase either must be absorbed by coal producers or passed along to consumers. This presents a Hobson's choice to the industry. Absorbing the cost of a tax increase may eliminate some operators' ability to survive; raising prices even in long-term utility-supply contracts, the life blood of the coal industry,[38] would prompt the move toward electric utilities' purchase of foreign electricity or diversion of resources from coal-fired plants to facilities that use fuel other than domestic coal.[39] Congress and the Executive branch have reaffirmed the imperative role of a healthy domestic coal industry both in United States energy policy and for national security.[40] This policy would be

241, 99th Cong., 2d Sess., pt. 1, at 75-76, *reprinted in* 1986 U.S. Code Cong. & Ad. News 653-654.

37. *Hearing on the United States-Canada Free Trade Agreement before the Subcommittee on Mining and Natural Resources, House Comm. on Interior and Insular Affairs*, 100th Cong., 2d Sess. (March 10, 1988) (Statement of James M. Friedman).

38. Park et al., "Coal Supply Contracts," 4 *Coal Law and Regulation* §84 (1987).

39. *See generally*, John S. Herrington, Secretary, United States Dep't of Energy, *Energy Security, A Report to the President of the United States* 162-180 (Mar. 1987) [hereinafter cited as Energy Security Report].

40. *See* Mining and Minerals Policy Act of 1970, Pub. L. No. 91-631 § 2 (1970), 84 Stat. 1876, 30 U.S.C. § 21(a): "The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound

seriously undercut if the *Sebben* holding is permitted to make massive, costly *changes in the black* lung program.

The Longshore Act's procedures are comprehensive, complete and exclusive. 33 U.S.C. § 921. There is simply no authority for the Eighth Circuit's ruling under the Longshore Act. Similarly, res judicata is mandatory. "There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). And the mandamus statute, 28 U.S.C. § 1361, is inapplicable here, because the district court lacks jurisdiction to invoke it. The *Sebben* decision ignores all this.

Instead, *Sebben* orders the revival of old, closed claims.[41] And the decision virtually guarantees awards, given the problems of proof in these stale claims, the limited resources and limited mission of the Department of Labor to defend such claims and the lack of any avenues of rebuttal by medical evidence even if the claims were defended. At the same time, such a precedent invites every denied workers' compensation claimant to proceed outside

and stable domestic mining . . . industries." Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201(a): "coal mining operations presently contribute to the nation's energy requirements . . . ." *See also* Energy Security Report *supra* note 39.

41. Employers have never received notice of the existence of many of these claims. As explained in *U.S. Pipe and Foundry Co.* v. *Webb*, 595 F.2d 264, 271-274 (5th Cir. 1979), the DOL's applicable regulations (20 C.F.R. § 725.151 (1978); 20 C.F.R. § 725.412 (1987)), the DOL does not normally give notice to a potential responsible coal operator defendant of a claim unless: (a) the claim is administratively approved; or (b) after a claimant in a denied claim requests a hearing. Thus, in thousands of cases in the *Sebben* class in which claimant did not appeal denials under the 20 C.F.R. Part 727 (1987) eligibility standards, re-opening will prompt notice to employer *for the first time* that he must defend a particular black lung claim. By the terms of the 1977 amendments, all of the *Sebben* class members filed between December 20, 1969, and April 1, 1980. *Sebben*, if undisturbed by this Court, will require the defense of claims that are a minimum of *nine* years old and could be almost twenty years old. The opportunity to obtain an expert medical examination will concurrently be nine or more years stale, and the aging process or intervening death of the claimant will thwart any bona fide defense effort.

the prescribed statutory scheme for adjudication of claims. *Sebben* requires the courts to keep its doors open indefinitely to any black lung claimant dissatisfied with an administrative agency's action at the expense of the coal industry. The resulting unfairness to the industry is manifest.

CONCLUSION

The decisions below in *Sebben* and *Broyles* are wrong for the reasons set forth in Petitioners' Brief and would impose substantial unwarranted burdens on the coal industry. Therefore, the judgments of the Fourth and Eighth Circuits should be reversed.

Respectfully submitted,

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